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Supreme Court of the United States,

OCTOBER TERM, 1903.
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No. 235.

ANDREW J. DAVIS,
Plaintiff in Error,

vs.

HIRAM R. MILLS AND CLARENCE C. FROST,
Defendants in Error.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN BEHALF OF HIRAM R. MILLS, SOLE SURVIVING DEFENDANT IN ERROR.

WM. WALDO HYDE,
CHARLES E. PERKINS,
Counsel for Defendant in Error.

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STATEMENT.

A clear understanding of the exact points raised in this case by the question which has been certified to this court by the Circuit Court of Appeals for the Second Circuit requires a consideration of the following facts:

This cause is an action at law which was commenced in the Circuit Court of the United States for the District of Connecticut, by Andrew J. Davis of Montana, assignee, plaintiff, against Hiram R. Mills and C. C. Frost, both of Connecticut, defendants, by

writ and declaration wherein the following facts were alleged:

(*a*) That on and prior to the 1st day of September, A. D. 1890, the defendants and others were trustees of the Obelisk Mining & Concentrating Company, a corporation organized under the laws of the State of Montana and located at Butte City, in said state, and that the defendants then were and at all times since have been residents and citizens of the State of Connecticut and non-residents of said State of Montana.

(*b*) That said corporation filed a report as required by the statute of the State of Montana, on the 20th day of September, 1890, and on the 1st day of September, A. D. 1892, signed by its president and a majority of the trustees of said company and verified by the oath of the president and secretary of said company, stating the amount of its capital, the proportion actually paid in, and the amount of its existing debts, but that said corporation failed to file such annual report of its affairs as required by said statute in September of the years 1891 and 1893.

(*c*) That on the 31st day of May, A. D. 1892, the said Obelisk Mining & Concentrating Company gave its note, payable at sixty days without grace, to the State Savings Bank of Butte City, Montana, for $1,000, which note was not paid at maturity.

(*d*) That on and prior to the 27th day of April, A. D. 1892, F. E. Miller and Charles A. Chapman, copartners in business at said Butte City, Montana, claimed to have sold and delivered to the said Obelisk Mining & Concentrating Company certain goods of the value of $1,319.07, upon which $300 was paid by said Obelisk Mining & Concentrating Company July 1, 1892, and that on or about the 8th day of Novem-

ber, 1893, said Miller and Chapman assigned all their property, including the above described account, to Adam F. Brown in trust for the purpose of paying all the debts of said F. E. Miller and Charles A. Chapman, and that on or about the 21st day of September, 1895, the said Adam F. Brown, as such assignee of the said Miller and Chapman, obtained judgment against the said Obelisk Mining & Concentrating Company on account of said indebtedness for the sum of $1,365.53.

(*e*) That the Butte Hardware Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, at sundry times, between the 5th day of January, 1892, and the 12th day of December, 1892, sold and delivered to the said Obelisk Mining & Concentrating Company goods, wares, and merchandise of the value of $1,968.96, which claim by payments thereon was subsequently reduced to $1,071.36.

(*f*) That on the 24th day of June, 1897, said State Savings Bank, the said Brown, as such trustee, and the said Butte Hardware Company, respectively, assigned and transferred their said several claims to the plaintiff, said A. J. Davis.

(*g*) That neither of the said debts, nor any part thereof, has ever been paid, and that the said Obelisk Mining & Concentration Company was wholly insolvent and had no property out of which the said indebtedness could be paid.

(*h*) That Section 460 of Chapter 25 of the Fifth Division of the Compiled Statutes of the State of Montana provided as follows:

> " Every such company shall, annually, within twenty days from the first day of September, make report, which shall be published in some newspaper published in the

town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital and of the proportion actually paid in and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee, or board of trustees, by virtue of the provisions of this section, for a failure to cause to be published in a newspaper the report in this section mentioned, if within the time herein mentioned said trustee, or board of trustees, or company, shall annually cause said report to be filed in the office of the county clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation."

(*i*) That, the said Obelisk Mining & Concentrating Company having failed to make the report required by said section of the statutes of Montana within twenty days of the 1st day of September, 1891, and within twenty days from the 1st day of September, 1893, the defendants were jointly and severally liable for the above-entitled indebtedness of said corporation.

Said action was commenced by service upon the defendants on June 30, 1897.

The declaration then contained two counts — the first count based upon the aforesaid note to the State Savings Bank of Butte City for $1,000, dated May 31, 1892, due July 31, 1892, and the second count based

upon said claim of Miller and Chapman for goods sold and delivered prior to July 1, 1892, amounting, less the payment made thereon, to $1,019.07, with interest and costs in addition thereto.

On October 18, 1897, by an amendment, a third count was added to said declaration based upon said claim of the Butte Hardware Company for goods sold and delivered between January 5, 1892, and December 12, 1892, amounting, less payments, to $1,071.36.

The indebtedness alleged in the first count of said complaint accrued, as against said corporation, July 31, 1892.

The indebtedness alleged in the second count of said complaint accrued, as against said corporation, prior to July 1, 1892.

The indebtedness alleged in the third count of said complaint accrued as against said corporation on or before December 12, 1892.

The liability of the trustees for said indebtedness because of failure to make return, as alleged in the complaint, accrued as follows:

As to the debts stated in the first and second counts, the liability of the trustees accrued upon the 31st day of July, 1892, and the 1st day of July, 1892, respectively, said trustees then being in default by reason of their failure to have made the reports required by the statute of the State of Montana to be filed within twenty days from the 1st day of September, 1891, to wit, on the 20th day of September, 1891.

As to the debt alleged in the third count, the trustees not being in default at the time when said debt accrued, their liability accrued, if ever, by reason of their failure to make the return required by the statute of the State of Montana within twenty days from the 1st day of September, 1893, to wit, on September 20, 1893.

When the cause of action accrued the compiled statutes of Montana contained these sections:

> "Sec. 45. In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the territory, except when the statute imposing it prescribes a different limitation. Second, an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process . . . shall be commenced within one year from the time the cause of action accrued."

> "Sec. 50. If when the cause of action shall accrue against a person when he is out of the territory, the action may be commenced within the time herein limited, after his return to the territory; and if after the cause of action shall have accrued he depart from this territory, the time of his absence shall not be a part of the time limited for the commencement of the action."

Both of these sections were repealed by the "Code of Civil Procedure" of Montana, Section 3482, which went into effect July 1, 1895; and on the same day a new code, "The Civil Code of Montana," went into effect, in which the Section 460 of Chapter 25 of the Fifth Division of the Compiled Statutes of Montana, above quoted (being the statute upon which this action is based), was re-enacted, without change, as Section 451 of said new code.

The Code of Civil Procedure (of Montana), which also went into effect on the same day, July 1, 1895, contains a separate *title* numbered II, containing four chapters (Sections 470 to 559). This title deals exclusively with " the time of commencing actions." It contains the following sections:

> " Section 515. Within two years.
>
> "(1.) An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

> " Section 541. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

And also:

> " Section 554. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability created."

The statute of Connecticut upon which the defendant relied, if the statute of the forum should be found applicable to the cause of action, is Section 1379 of the General Statutes of Connecticut (1888), (being Section 1120 of the General Statutes of Connecticut, Revision 1902), which reads as follows:

> " Section 1379. No suit for any forfeiture, upon any penal statute, shall be brought but within one year next after the commission of the offense."

The defendants demurred to the complaint on the three following grounds:

> "1. Because it appears from the complaint that the several causes of action therein alleged accrued more than one year prior to the commencement of the action":

that being the period of limitation prescribed by Section 1379 of the General Statutes of Connecticut (Revision of 1888), within which a suit may be instituted for a forfeiture under a penal statute, and also the period prescribed by Section 45 of the Compiled Statutes of Montana, above quoted, which was in force when the right of action accrued.

> "2. Because it appears from the complaint that the several causes of action therein alleged all accrued more than two years prior to the commencement of the action":

this being the time limited for the commencement of an action for a penalty or forfeiture under the new statute, Section 515 of the Code of Civil Procedure of the State of Montana, above quoted.

> "3. Because it appears from the complaint that the several causes of action therein alleged all accrued more than three years prior to the commencement of the action":

this being the period specially limited by Section 554 of the Code of Civil Procedure of the State of Montana, above quoted, within which "actions against directors of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, *must be brought.*"

In the United States Circuit Court for the District of Connecticut Judge Townsend sustained this demurrer of the defendant. We quote his opinion, reported in 113 Fed. Rep., p. 678:

"Demurrer to complaint in action at law. This case has already been considered on motion for leave to amend (83 Fed., 982), and on demurrer to plea to jurisdiction (99 Fed., 39). The present demurrer is on the ground that the cause of action is barred by the statutes of limitations both of Montana and Connecticut. The defendants contend as follows:

> "'First, that the statute of the state of Montana under which this action is brought is penal, in so far as the application of the statute of limitations is concerned; second, that the statute of limitations of the state of Montana must govern the decision of this court; and, third, that, whether the statute of the state of Montana or the statute of the state of Connecticut is applied, the court must hold that the plaintiff's cause of action is barred.'

"The question of the character of the Montana statute was exhaustively discussed on a former hearing, and was fully considered in the opinion. The conclusion was there reached that the statute was not a penal one in the sense that it could not be enforced in a foreign jurisdiction. 99 Fed., 39. The statute of Montana (Code Civ. Proc., § 515) reads as follows:

> "'Sec. 515. Within two years. (1) An action upon a statute for a penalty or forfeiture when the action is given to the individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.'

"The Connecticut general statute as to penalties is as follows:

> "'Sec. 1379. No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense.'

"That the statutory liability in this case comes within the terms of the Montana statute has been decided in the

highest court of that state (Gans v. Switzer, 9 Mont., 408, 413; 24 Pac., 18; Elkhorn Trading Co. v. Tacoma Min. Co., 16 Mont., 322; 40 Pac., 606; Bank v. Johnson, 45 Pac., 662; 33 L. R. A., 552; 56 Am. St. Rep., 591; Wethey v. Kemper, 17 Mont., 491; 43 Pac., 716), and the construction of the Montana statute is binding upon this court. Plaintiff claims strongly that the Connecticut statute of limitations, and not that of Montana, must be applied. If the liability comes within the terms of the Montana statute, it would seem that it also comes within that of the Connecticut statute. The words 'penalty or forfeiture' in the Montana statute are substantially equivalent to the words 'forfeiture upon any penal statute' in the Connecticut statute. If the Connecticut statute above quoted is not applicable, it is not clear that any statute of that state would bar this action, and the liability of defendants might thus be continued indefinitely. While there is no decision of the highest court in Connecticut precisely bearing upon the question arising here, Mitchell v. Hotchkiss, 48 Conn., 18; 40 Am. Rep., 146, concerns a somewhat similar state of facts. The Connecticut statute provided that if the president and secretary of a corporation should intentionally neglect or refuse to file annually certificates showing the condition of the corporation with the town clerk, those officers should be liable for all the debts of the corporation contracted during the period of such neglect. The question raised was whether the cause of action survived the death of the officer who had become liable under this statute. The court held that the statute did not create any contract relation or duty between the creditors of the corporation and its president; that there was no privity between the president and the plaintiff, and that the former had owed the latter 'no private duty from which a promise might be implied'; that the duty to be performed was a public duty, required by public policy for the general welfare; and that the willful neglect of the prescribed duty was a public wrong, invoking the penalty of the statute, — and cites various authorities to the same effect. A comparison of Mitchell v. Hotchkiss, supra, with Plumb v. Griffin, 74 Conn., 132; 50 Atl., 1, very recently decided in the Supreme Court of Connecticut, confirms this view. A statute of Connecticut provides

that 'any person who cuts trees or timber on the land of another without a license shall pay to the party injured two dollars for every tree, or one for any timber.' It was claimed that this was a forfeiture, and that suit must be brought within one year. The court holds that a statute which merely gives to the party injured increased damages is not a penal statute. In Mitchell v. Hotchkiss the court held that the statute making officers of corporations liable for failure to file reports comes clearly within the definition of a penal one, and that the action did not survive against the executor. If necessary for the decision of this case, it should be held, following the intimation in Hobbs v. Bank, 37 C. C. A., 513; 96 Fed., 396; id., 41 C. C. A., 205; 101 Fed., 75, and the decision in Brunswick Terminal Co. v. National Bank of Baltimore, 40 C. C. A., 22; 99 Fed., 635; 48 L. R. A., 625, that the Montana statute of limitations controls the operation of the statute governing the penalty in other states as well as in Montana; and, if this be not so, it should be held that the action is for a penalty and should be brought within one year under the Connecticut statute.

"The demurrer is sustained."

This writ of error was then sued out by the plaintiff in error to the Circuit Court of Appeals for the Second Circuit, in which was contested not only all the defenses based on said several statutes, but it was further claimed by the plaintiff that the defense of the statute of limitations could not be raised in this action by demurrer.

The Circuit Court of Appeals, as appears by their opinion, 121 Fed. Rep., page 703, overruled this latter claim, and held that the defense of the statute of limitations might properly be raised by demurrer — relying upon the Connecticut case of The Hartford & Connecticut Western R. R. Co. vs. Montague, 72 Conn., 692, as establishing the Connecticut practice which was controlling.

Said Circuit Court of Appeals further held that the provisions of the section of the General Statutes of the State of Connecticut, above referred to, limiting a time for bringing suits for any forfeiture upon a penal statute (ante, page 7), did not apply to the cause of action set forth in the complaint. This conclusion was based upon a Connecticut decision (Plumb vs. Griffin, 74 Conn., 132), a case not at all analogous to that here presented. While the decision of that case commends itself, much of its opinion was obiter and assumed a rule of construction which, with all respect, we cannot believe the Court of Connecticut would itself follow.

Said Circuit Court of Appeals further held that, Section 45 of the Compiled Statutes of Montana, above quoted, having been repealed, July 1, 1895, by the new Code of Civil Procedure, the effect of that legislation was to abrogate the old Section 45 of the Compiled Statutes.

Said Court of Appeals further held that by reason of Section 554, above referred to, none of the provisions of Section 515 were ever applicable to such a cause of action as that set forth in the complaint.

Said Circuit Court of Appeals, however, did not agree as to whether the provisions of said Section 554 were applicable to this cause of action brought in the State of Connecticut.

In view of all these facts and considerations, which are fully set out in the record which was before the Circuit Court of Appeals and which are discussed in the opinion rendered, said Circuit Court of Appeals certified to this court the following question:

May the Defendant, in an Action of the Kind Specified in Section 554 of the Code of Civil Procedure of Montana Avail of a Limitation Therein Prescribed, When the Action is Brought Against Him in the Court of Another State?

The defendant claims:

1. Where a state creates a new right, arising wholly from its statute, which right is not known to the common law and does not arise out of any contract, or from any tort, and a statute of that state also fixes a time within which actions under that statute to enforce that right *must be brought,* while suit upon such statute may be brought in another state, it *must* be brought within the time limited by the statute of the state which created the right.

This rule is especially applicable to penal actions and to actions of a penal nature.

2. The statute of Montana, under the authority of which this suit is brought, is penal at least in so far as the application of the proper statute of limitations is concerned. It has been so generally held, so judicially construed by the highest courts of its own state, and, by re-enactment of the statute, that construction has been adopted by the legislature of the state, and is now beyond controversy.

3. Section 554 of the Code of Civil Procedure of Montana was specifically and in terms made to apply to actions under said statute which created the liability, and is as effectually a part of the same as

though actually contained in the same section. It limits the liability and bars the right. It operates infallibly and without condition, whenever and wherever the right is sought to be enforced.

ARGUMENT.

I.

Where the statute of a state gives a new right arising solely on that statute, and not arising by common law or by contract or from any tort, and the statute of that state also fixes a limitation of time within which suit must be brought to enforce such right, when such suit is brought in another state, the right to sue and the limitation of the time of suing go together.

The new right of action being unknown to the forum, and being enforced in Connecticut only on the ground of comity between states, the whole law of the home state upon the subject, that creating the right and that limiting or explaining the right are to be treated, for the purposes of this suit, as though they were on the statute book of the forum.

It is a general rule that a cause of action not grounded on contract or existing at common law, but founded entirely on the statute, takes the statute of limitations with it.

Thus, Wood on Limitations, 2d Ed., page 35, says:

> "When the statute of a particular state or country gives a remedy which did not exist at common law, and

at the same time limits the period within which action therefor shall be brought, the period of limitation thus named controls in whatever jurisdiction action may be brought."

So, also, Buswell, in his work on Limitations and Adverse Possession, Section 351, states the law as follows:

"The same principle applies to cases in which the plaintiff's cause of action arises from the operation of a statute which confers upon him a right which did not exist at common law. Such a right can only be pursued in a foreign state subject to all the conditions and limitations imposed by the statute which creates it; for the conditions qualify the right and are an integral part of it, and unless these are fully complied with the right does not exist. So if an action to enforce such a right be brought in a foreign state, the limitation of the *lex loci contractus* will apply; for to apply a contrary rule would be to uphold a right of action not existing at common law, and which has been lost under the foreign statute which created the remedy as supplementary to the common law. This rule was applied in an action brought in Michigan under a Canadian statute giving to administrators the right to recover damages for the death of passengers killed by the negligence of common carriers, it being held that the limitation to such actions fixed by the Canadian statute would apply. Where, under a decree of the court of a state, assessments were laid upon shares of corporate stock and an action was brought in another state to recover such assessments, it was held that the limitation would run upon such suit only from the time of the assessment made by the decree of the court in the former state, although by the local law of the latter state the action would be barred."

In the case of Boyd, Admr., vs. Clark et al., 8th Fed. Rep., 849, Mr. Justice Brown, then district judge, held the following to be the rule (page 852):

"The true rule I conceive to be this: that where a statute gives a right of action unknown to the common

> law, and, either in a proviso to the section conferring the right, *or in a separate section,* limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue."

The doctrine thus held by Justice Brown was distinctly approved in the case of Theroux vs. Northern Pac. R. R. Co. et al., 64 Fed. Rep., 85, where the Circuit Court of Appeals for the Eighth Circuit say (Thayer, J., rendering the opinion):

> "It was held in Boyd v. Clark, 8 Fed. Rep., 849, which is a leading case on the subject, that when a statute of a state or country gives a right of action unknown to the common law, and, in conferring the rights, limits the time within which action may be brought, such limitation is operative in any jurisdiction where it is sought to enforce such cause of action. The same doctrine was recognized and approved in the following cases: The Harrisburg, 119 U. S., 199, 214; 7 Sup. Ct., 140; Munos v. Southern Pac. Co., 2 U. S. App., 222; 2 C. C. A., 163; 51 Fed., 188; Eastwood v. Kennedy, 44 Md., 563; Railway Co. v. Hine, 25 Ohio St., 629, and O'Shields v. Railway Co., 83 Ga., 621; 10 S. E., 268. Indeed, it may be said that cases of the kind last referred to form a well-established exception to the general doctrine that the *lex fori* governs in determining whether a cause of action is barred by limitation."

So, in The Harrisburg, 119 U. S., 199, 214. This was a suit in the District Court of the United States for the Eastern District of Pennsylvania to recover damages for a death occasioned by negligence of a steamer in a collision in a sound of the sea embraced within the coast of Massachusetts. By the statutes of Massachusetts and Pennsylvania in force at the time of the collision the time for commencing an action of this character was limited to one year from

the date of injury. Mr. Chief Justice Waite in discussing the suit says:

> "The statutes create a new liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

And, as stated by Judge Thayer in the case of Theroux vs. Northern Pac. Railway Co., supra, page 86:

> "The same thought was expressed by the Supreme Court of Ohio in Railway Co. v. Hine, supra, and by the Supreme Court of Maryland in Eastwood v. Kennedy, supra. In the Ohio case it was said that a proviso contained in a statute creating a new cause of action which limits the right to sue to two years is a condition qualifying the right of action, and not a mere limitation of the remedy. It must be accepted, therefore, as the established doctrine, that where a statute confers a new right, which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations, which merely affects the remedy."

Many other cases might be added to this list in which the law has been laid down in strict harmony with the foregoing quotations.

A large number of these cases are suits brought upon statutes giving a right of action for wrongful death and in which the provision limiting a time for bringing suit is a part of the statute giving the remedy.

The same doctrine is to be found laid down in the case of Dennick vs. Railroad, 103 U. S., 11. This was an action brought in the State Court of New York against the Central R. R. Co. of New Jersey to recover damages for an accident on the defendant's railroad. The case was removed to the Circuit Court of the United States for the Northern District of New York, and subsequently by writ of error brought to this honorable court. This court, after full consideration, held, Mr. Justice Miller delivering the opinion (page 20):

> "But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute."

In other words, as stated by Mr. Justice Brown, in Boyd vs. Clark, supra (page 850):

> "It is a well established principle of law that where a right of action is given by a state statute such right may be enforced in another state, and also that such right will be enforced according to the forms and modes of procedure in use in the latter state. Or, to put it briefly, the *lex loci contractus* governs the rights of parties, but the *lex fori* determines the remedy. This principle has been applied in a large number of cases arising upon contracts, but in the recent case of Dennick v. Railroad Co., 103 U. S., 11, it was applied to a statute of this description, where the administrator brought his action in another state."

In this case the plaintiff has claimed, however, that the limitation of the state giving the right, to be

effective elsewhere, must be included in the same section of the statute.

We maintain that this contention cannot be sustained, where, as in the case at bar, the statute of limitations relied on expressly refers to the statute upon which the right of action is based, and expressly excludes the latter from the operation of its chapters containing the general statutes of limitations.

In the case at bar the statute of limitations of the State of Montana, Section 554 of the Code of Civil Procedure, by its terms provides that actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, *must be brought* within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability created.

This section of the statute of the State of Montana went into effect, as has already been stated, upon the same day that the statute giving the right of action upon which the defendants are sued in this case went into effect, to wit, on the 1st day of July, 1895.

The legislature saw fit, instead of placing this statute in the same section with the statute creating the liability, to place it with its statutes of limitation, under a separate title, where it would effectually negative or exclude the operation of the general limitations upon the remedy. To claim that it does not apply to and limit the right created by the section

imposing the liability is to allow to this statute no effect whatsoever.

In other words, it in effect erases and makes null and void the limitation which it attempts to create.

In this connection it should be observed that in the case of The Harrisburg, supra, the statute of Massachusetts, referred to by the court in its opinion, inflicting the penalty for the loss of life by reason of the negligence of a corporation, was contained in Sections 97 and 98, Chapter 63 of the General Statutes of Massachusetts for 1860, while the statute limiting a time for the prosecution of an indictment for such penalty was contained in Section 99; and the statute of Pennsylvania, referred to in the same case, authorizing suit for damages for the loss of life by negligence, was contained in Section 19 of the laws of 1851, page 674, while the statute limiting the right to bring such action to one year was contained in Section 2 of the laws of 1855, page 309.

In other words, this court in that case distinctly upheld the principle for which we are here contending.

The claim of the plaintiff, we suppose, will be that in all cases where a right is given by statute and the act giving the right expressly provides that the existence of the right itself shall depend on the bringing a suit within a specified time, then the suit must be brought within that time whether brought in the state or elsewhere, but that in the case of a general statute of limitation no such rule applies and the *lex fori* is to be followed, because in such cases there is

not an express provision that the right itself shall depend on bringing the suit within a specified time, and some courts have adopted this view.

We submit that this is an error caused by a want of discrimination between different classes of cases.

There is one class where a statute says that all stockholders shall be liable to the extent of double the par value of the stock, or even more.

In this class of cases this, as well as other courts, have held that the obligation is contractual; that is, that when a subscription is made the subscriber agrees to pay this additional liability just as much as he does to pay the par value of the stock he subscribes for.

Whitman vs. Bank, 176 U. S., 569.

Being then merely an action on a contract the general statute of limitation may be said, with some reason, not to go with it to a foreign state.

So in the case of statutes providing that actions may be brought for a death caused by negligence. It is held that the negligence which caused the death is the real ground of action and that negligence and liability existed apart from any statute. By the rules of the common law no action could be brought for the death of a person for the very wise reason, among others, that the injury was too great to be justly estimated in damages, and it is held that all that the statute did was merely to remove this bar.

The statute was not the foundation of the liability; that was caused by the negligence.

Stewart vs. Baltimore R. R., 168 U. S., 445.

In such cases, therefore, as the statute does not create the liability, but the liability arises from the tort of the defendant, it may also be said that the general statute of limitations as to actions on torts does not go with it.

This case at bar, however, is not like either of the cases above referred to.

There was no contract of any kind here, nor was there any negligence of the defendant that caused any injury of any kind to others. No one trusted the company on the strength of any acts of the defendant. The statute alone imposed the duty, and said that if that duty was not performed the defendant should be liable. This made the statute a very penal one and, as we have shown, where a statute is clearly penal, a statute of the state enacting it limiting the time within which an action can be brought for the penalty goes with it, and is held to be a limitation of the right just as much as if it were made a proviso to each statute which imposed a penalty.

In some cases of this kind the courts have evidently overlooked the distinction between the liability of stockholders and trustees, and because a statute making stockholders liable for more than the par value of their stock constituted a part of the contract of subscription, have assumed that the liabilities of stockholders and of trustees are of the same character.

But this is clearly an error. The liability of the trustees does not arise from any contract or agreement, as does that of stockholders.

The trustees may not be stockholders, and their position is entirely different.

It is suggested also in some of the cases that all liability of stockholders arises from statute, and that if it were not for statutes they would all be liable as partners for all the debts of the corporations. But this is also an error. As a general rule the limitation of the liability of the stockholders to the amount of their subscription is by common law, and only their liability beyond that is imposed by statute.

1 Cook on Stockholders, Sec. 212.

II.

The statute of the state of Montana under which the suit is brought, at least so far as the application of the statute of limitations is concerned, under the decisions of the highest courts of that state, is penal.

In view of the opinion of the Circuit Court of Appeals that the enactment of Section 554 of the Code of Civil Procedure of Montana, upon which the question submitted by them to this court is based, superseded Section 515 of said Code of Civil Procedure and made the provisions of said section inapplicable to such a cause of action as is set out in the complaint,

the question arises as to whether or not the statute of Montana giving the right of action against the trustees on account of failure to file their annual reports is so far penal that, except for the passage of Section 554, Section 515 would have applied.

Prior to the decision of the Supreme Court of the United States in the case of Huntington vs. Attrill (146 U. S., 657), the consensus of opinion throughout the courts of the United States had been that statutes enforcing upon directors or trustees of corporations liability for the debts of a corporation on account of failure to file reports provided by law were penal.

Bank vs. Bliss, 35 N. Y., 412.
Veeder vs. Baker, 83 N. Y., 160.
Stokes vs. Stickney, 96 N. Y., 323.
Engine Co. vs. Hubbard, 101 U. S., 188.
Chase vs. Curtis, 113 U. S., 452.
Lawle vs. Burt, 7 Ohio St., 340.
Sturgis vs. Burton, 8 Ohio St., 215.
Knox vs. Baldwin, 80 N. Y., 610.
3d Thompson Comm. Corporations, Sec. 4361, *et seq.*

In the case of Engine Co. vs. Hubbard, supra, this court, Mr. Justice Clifford, on page 192, said as follows:

> "Repeated instances have occurred where suit was brought in one state to enforce the statute liability for the debts of a corporation created by the legislature of another state, in all which it is held that the statute is penal, and that it can only be enforced in the state where the statute was passed. Halsey v. McLean, 12 Allen (Mass.), 438; Derrickson v. Smith, 3 Dutch (N. J.), 166; Sturges v. Burton, 8 Ohio St., 215; Bank v. Price, 33 Md., 487; Irwin v. McKeon, 23 Cal., 472.

> "Corresponding decisions have been made in other courts, and to such an extent as to justify the remark that the rule is universal. Bird v. Hayden, 1 Robt. (N. Y.), 383; Moier v. Sprague, 9 R. I., 541."

The law as laid down in that case had been considered as settled until the decision in the case of Huntington vs. Attrill.

Since that decision the decisions of the courts throughout the United States have been involved in uncertainty and disagreement as to the extent to which this court intended to hold that statutes of the character of the one sued on in this case were not penal.

Clearly it was not intended in that case to hold that the statute was not penal in any sense whatever, for the court, Mr. Justice Gray, in rendering the opinion, page 676, said:

> "As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed."

The sole question there was whether or not the statute in question was so far a penal act as to come under the rule that one state would not enforce the criminal laws of another, and the court held it was not; that the word "penal" had different meanings, and the statute might be penal as to construction, etc., though not penal in an international sense — that is, in so far as not to be enforceable at all in the courts of another state. The question as to whether the statute was penal under the meaning of the word in the statute of limitations did not arise at all.

In the case of Brady vs. Daly, 175 U. S., 148, this court, Mr. Justice Peckham delivering the opinion, gives an interpretation of the decision in Huntington vs. Attrill, supra, in harmony with the views we have presented, and on page 155 the court says:

> "In Huntington v. Attrill, 146 U. S., 657, 667, there is a very full discussion of the meaning of the word 'penal' when used in reference to the maxim of international law that 'The courts of no country execute the penal laws of another.'"

In Patterson vs. Thompson, 86 Fed. Rep., 85 (1898), Judge Gilbert of the United States Circuit Court for the District of Oregon was required to determine whether a statute prescribing a similar liability was, or was not, penal. The statute read:

> "If the directors of a corporation declare and pay dividends when the corporation is insolvent, or which render it insolvent or diminish the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office."

The defendant, as here, demurred, one ground of demurrer being that the action was not brought within three years limited by the statute for the commencement of actions to recover penalty. The demurrer was sustained, the court holding that in so far as the directors were concerned the statute was in the nature of a penalty, and Judge Gilbert clearly and forcefully presented both the reasons and the weight of authority leading to this result, citing a number of recognized authorities upon the subject. The whole opinion is very instructive.

In that case, Huntington vs. Attrill, supra, was urged by the plaintiff in support of his contention that the Supreme Court had overruled its former holding that such a statute is penal; but the court overruled this contention, holding that Huntington vs. Attrill held such statutes to be penal only in the international sense — that is, that they may be enforced in other states than that in which the liability was created. We quote (page 87):

> "Counsel for the plaintiff contend that by the decision in Huntington v. Attrill, 146 U. S., 657, 13 Sup. Ct., 224, the supreme court has overruled its former holding that such a statute is penal. It will be seen, however, on a careful consideration of that case, that the decision was based upon a consideration of the remedial purpose of the statute and the protection intended to the creditor, and that the court went no further than to hold that such a statute is not penal, in the sense that it will not be enforced in a state other than that in which the liability was created. In the later case of Bank v. Remsen, 158 U. S., 337, 15 Sup. Ct., 891, it was again ruled that such a statute is one of a penal character, and in the opinion the court remarked that the purport of the decision in Huntington v. Attrill was that such a statute was not 'a penal law in the international sense.'"

The statute limiting the time for the commencement of actions for the recovery of penalties was held to be the statute applicable to such actions.

In National Park Bank of New York vs. Remsen et al. (1895), 158 U. S., 337, 15 Sup. Ct., 891, it was held that the statute of New York, which is nearly identical with that upon which this action is brought, was penal so far, at least, as the trustee was concerned, notwithstanding Huntington vs. Attrill, supra, which it interprets.

Mr. Justice Brewer, speaking in that case for the court, and without dissent, said (page 342):

> "That this statute is one of a penal character is settled, not merely by various decisions of the Court of Appeals of New York, but also expressly by this court in Chase v. Curtis, 113 U. S., 452, though as since held not 'a penal law in the international sense.' Huntington v. Attrill, 146 U. S., 657, 13 Sup. Ct., 224."

See also Chase vs. Curtis, 113 U. S., 452.

We maintain, therefore, that the case of Huntington vs. Attrill is not in point so far as our present contention is concerned.

While it is admitted that suits may be brought in other states to enforce the right of action given by such a statute as that here sued on, it by no means follows that the statute is not to be regarded as penal, not only in so far as its construction is concerned, but also in so far as the application of the statute of limitations is concerned.

The case of State Savings Bank of Butte City vs. Johnson, decided in Montana in the year 1896, four years after the decision in Huntington vs. Attrill, and reported in 18 Mont., 440, 45 Pac. Rep., 662, was in all respects on a parallel with the one at bar. The opinion of the court recognizes the fact that for some purposes statutes like the one in question may not be penal, but, referring to other Montana decisions in which the same question had arisen, the court says:

> "A statute of this nature is not universally held to be penal. (Thomp. Corp., § 4165; Morawetz, Priv. Corp., § 907 *et seq.*) But we are of opinion that, in applying the appropriate section of the statute of limitations, the action is classified as penal. (Gans. v. Switzer, 9 Mon., 413; 24 Pac., 18; Elkhorn Trad. Co. v. Tacoma

Mining Co., 16 Mon., 322; 40 Pac., 606; Wethey v. Kemper, 17 Mon., 491; 43 Pac., 716. Therefore, the action being for a penalty, the cause of action is barred in one year from the accruing thereof. (Code Civil Proc., 1887, § 45.) The accounts against the corporation matured at different times during the years 1891 and 1892. The trustees defaulted in making their report, required by law, both in 1891 and 1892, and, indeed, during every year. As to some of the accounts, the cause of action arose against the trustees upon their default in 1891, and upon others in 1892. This action was commenced in 1894. Therefore as to all of the accounts more than one year had run since the accruing of the liability by the trustees by reason of their default in filing the papers required by law."

We call the court's attention also to the case of Wethey vs. Kemper, 17 Mont., 491 (1895), where the court, referring to the statute in question, holds that the same is penal.

In Manhattan Trust Co. vs. Davis, 23 Mont., 273, decided in October, 1899, the cases of Gans vs. Switzer, Wethey vs. Kemper, and State Savings Bank vs. Johnson, supra, are cited with approval.

Moreover, the legislature of the State of Montana so understood the law and intended that the Section 515 of said code should apply to actions brought on the statute in question. This appears from the official publication of said code, Vol. 2, page 79, from which we quote as follows:

"THE MONTANA CODES ANNOTATED.

"In force on the 1st day of July, A.D. 1895.

"Chapter III.

"The time of commencing actions other than for the recovery of Real Property.

"Sec. 515. Within two years:

"1. An action upon a statute for a penalty or for-

feiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

"2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state.

"3. An action for libel, slander, assault, battery, false imprisonment, or seduction."

"STATUTORY PENALTY.

"An action against the trustees of a corporation to charge them with the debts of the company, because of its failure to file an annual report, comes within this section: Losee v. Bullard, 79 N. Y., 404; Knox v. Baldwin, 80 *id.*, 610; Duckworth v. Roach, 81 *id.*, 49. So an action given against the seller of a lottery ticket to recover double the sum paid; Grover v. Morris, 73 N. Y., 473."

It may be claimed that the decisions of the Supreme Court of Montana, supra, were with reference to the old statute of Montana, Section 45 of the Compiled Statutes, supra.

It is to be observed, however, that the new statute is identical in its terms with the old, with the exception of the injection of the words *"upon a statute,"* which we have italicized in the comparative reading which follows:

THE OLD Sec. 45.	THE NEW Sec. 515.
"In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the territory, except when the statute imposing it prescribes a different limitation."	"An action *upon a statute* for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

The construction of this statute by the Montana court of last resort will be followed everywhere until changed at home.

Flash vs. Conn, 109 U. S., 371-378.

The construction of the Montana statute here sued upon has not only not been changed at home, but it has been since re-enacted without change, and thereby the construction of the Montana courts has been, in effect, enacted into it and confirmed by the legislature.

It is a familiar and imperative rule of construction of statutes that when the courts of a state have interpreted one of the statutes of that state and given to that statute a construction, if that statute is subsequently re-enacted or amended in any way which does not manifest an intent to change the construction, the re-enactment carries with it the judicial construction which it had previously received and makes that construction a part of the new statute, which must be thereafter read into it.

For the purpose of this discussion we need only to quote from the very recent case of Barrett's Appeal from the Board of Relief, 73 Conn., 288, where a Connecticut statute was being construed which had been re-enacted after a previous construction by the Supreme Court of Connecticut, and Judge Baldwin, speaking for that court, held that the former construction of the old statute was conclusively adopted by the legislature in re-enacting the statute in the same terms. We quote (page 291):

> "But in the Revision of 1888 the statutes which had been the subject of examination in Batterson v. Hartford

were reënacted in substantially the same terms. This carried with them and made a part of them the judicial construction which they had previously received. Crum v. Bliss, 47 Conn., 592, 599; Lounsbury v. Bridgeport, 66 *id.*, 360, 367; State *ex rel.* Judson v. County Commissioners, 68 *id.*, 16, 23; State v. Travelers Ins. Co., 70 *id.*, 590, 601, 603. Under these circumstances it is too late to inquire whether the original statutes, regulating returns to assessors of the market value of shares in trust or insurance companies, were intended to give the exemption of which the appellants now claim the benefit. That such was their intent was assumed in Batterson v. Hartford, and conclusively affirmed by the legislature by incorporating them, without substantial change, after they had thus received that construction, in the General Statutes. Whether, therefore, were the question of construction one to be examined *de novo*, we should or should not have reached any different conclusion, is immaterial."

We submit, therefore, that the legislative action of Montana " has carried into these statutes and made a part of them " the construction which we claim, and that irrespective of and notwithstanding any decisions of other courts, or any decisions which other courts could make as interpreting similar statutes of other states, this Montana statute of limitations referred to has been, by legislative action, made applicable to the statutory cause of action herein invoked, and that that construction is *imperative* everywhere until changed in Montana.

This construction, therefore, comes to this court along with the statute and imperatively compels this court to treat the statute sued upon as penal, and in the language of the Montana statute of limitation a " statute for a penalty or forfeiture."

Aside from the construction placed upon this Montana statute by the Supreme Court of that state

and by its legislature, we maintain that while such statute may not be held to be penal in the international sense, as laid down in Huntington vs. Attrill, yet it must in reason be held to be penal in many other respects.

The statute imposes liability in case of failure to make the returns required upon all the trustees of the company jointly and severally for all debts of the company then existing and for all that shall be contracted before such report shall be made.

Such a statute cannot in any way be held to be contractual.

It gives to parties who have contracted debts prior to the default a right to collect such debts from the trustees on account of their failure to comply with the terms of the statute. Such creditors cannot in any sense be held to have contracted their debts in view of such failures or of the fact that the trustees were in any sense an original party or surety for the claim.

As was said in the case of Gregory vs. German Bank of Denver, 3 Col., 332, which was an action in assumpsit against a trustee upon a statute substantially identical with the one here in question:

> "The liability of the trustees arising from a failure to publish an annual report is in no way related to the loss that creditors of the company may sustain by reason of such violation of the statute. The joint and several liability attaches to the trustees, not because creditors of the

company contracted with them, not because the corporation is insolvent, but because they neglected to perform a duty enjoined by law. It cannot be said that creditors of the company contracted with reference to any indemnity afforded by this section.

"Until the 20th day of January of each year, contracts are entered into with the corporation without regard to the possible failure of the trustees to publish their annual reports, and their consequent liability for the debts of the company. This statute is in its nature penal. It prescribes a determinate penalty for neglect of a duty, imposed by law, upon the trustees of companies . . . The amount of the forfeiture is measured by the aggregate debt contracted by the company. The liability is not founded upon contract, but arises from misconduct in office."

See also Mitchell vs. Hotchkiss, 48 Conn., 9. Patterson vs. Thompson, 86 Fed. Rep., 85.

Some confusion has arisen by confounding the liability of trustees imposed by statute for failure to make returns with the liability imposed upon stockholders for debts of the corporation. This distinction between the two classes of liabilities is clearly brought out in the cases of Whitman vs. The Oxford National Bank, 176 U. S., pages 559, 563, and Whitman vs. Citizens Bank et al., 110 Fed. Rep., 503, 506, 507.

In the case of Whitman vs. The Oxford National Bank this court (page 563) says:

"The liability which by the constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and

determined by the general common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas which prescribed the nature of the obligations which each thereby assumed to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute."

And in Whitman vs. Citizens Bank in 110 Fed. Rep., supra, decision upon this point was based upon the decision of the Supreme Court in the Oxford Bank case, above cited.

In fact, it seems to have been assumed in these cases that if the liability had been entirely statutory, and not contractual, the statute of limitations of Kansas would have governed. The whole argument of the opinion is based upon that distinction. If the same rule was to be applied to rights of action purely statutory in the same manner as to contractual obligations this court would have said so at once.

The same doctrine is discussed in the case of Jones vs. Barlow, 62 N. Y., 202, 210, where the court, Judge Folger, says as to the liability of trustees:

> " The language of the cases is, that this act is a highly penal one, extremely rigorous in its provisions (Miller v. White, 50 N. Y., 137); and it is said that the statute imposes a penalty upon the trustees for the omission of a prescribed duty, by compelling them to pay the debt of

another. To be sure, the stockholder, in his liability for the debts of the company, has been likened to a surety or a guarantor. (Moss v. McCullough, 5 Hill, 131, and some of the cases there cited.)

"But that liability arises not from the neglect of the stockholder and is not imposed as a punishment as for a wrong done. It is more in the nature of a contract implied from his becoming a stockholder, and he is liable in an original and primary sense, like a partner or member of an unincorporated association. (Corning v. McCullough, 1 N. Y., 47.) But a trustee made liable by the neglect to file a report is compelled to pay the debt of the company not upon a liability in any manner arising out of contract, or as strictly collateral to the contract or obligation of another, but as a punishment, a forfeiture for a wrong done. Bolen v. Crosby (49 N. Y., 183), though it speaks of the claims against the trustees as being collateral and incidental to the debt against the company, does not conflict with this view. For it is not the debt which they are compelled to pay, but a penalty, not in any manner arising from their contract, the extent of which is measured by the amount of the debt against the company."

It is to be observed that the statute of Montana in question is in substance the same as the statute of the State of New York governing the liability of trustees for failure to make annual returns, and that the New York statute has been repeatedly held to be penal in its nature, as will appear from the citations already given and many others which might be added.

III.

Section 554 of the Code of Civil Procedure of Montana, having superseded Section 515 and made the same inapplicable to such a cause of action as is set out in the complaint, while not a part of the section of the statute which creates the liability, refers to that section in terms, and is as much a part of it as if it had been contained in the same section; and when suit is brought to enforce the liability created by that statute it must be brought within the time limited in Section 554.

It is clear that except for the fact, as laid down by the Circuit Court of Appeals, that Section 554 has rendered the provision of Section 515 inapplicable to the cause of action set out in the complaint, it must have been held that the causes of action sued on were barred by the provisions of Section 515.

Section 554 comes, therefore, within the exception of Section 515 as follows: "Except when the statute imposing it prescribes a different limitation."

The doctrine for which we are contending is distinctly laid down in the case of Brunswick Terminal Co. vs. National Bank of Baltimore, decided by the Circuit Court of Appeals for the Fourth Circuit, February 6, 1900, 99th Fed. Rep., 635. In this case the bill was filed by the appellants, creditors of the Brunswick State Bank of Georgia, against the National Bank of Baltimore in the Circuit Court of the United States for the District of Maryland.

The Code of Georgia of 1882, Section 1496, provided as follows:

> "When a stockholder in any bank or other corporation is individually liable under the charter, and shall ity, unless he receives a written notice from a creditor, within six months after such transfer, of his intention to hold him liable: Provided he shall give notice once a month, for six months, of such transfer, immediately thereafter, in two newspapers in or nearest the places where said institution shall keep its principal office."

The appellee was at one time a stockholder of the Brunswick State Bank of Georgia, and, upon transfer of its stock, failed to comply with the statutory provisions last set forth, and appellants claimed that it had incurred the stockholders' liability provided for in the charter of the bank, and was by reason thereof liable to them.

The Code of Georgia of 1882, Section 2916, provided as follows:

> "All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues."

The single question determined in that case was whether the statute of limitations of the State of Maryland or of the State of Georgia applied to the claim.

The Circuit Court of Appeals for the Fourth Circuit held that the statute of the State of Georgia governed the case and not the Maryland statute. The court in its opinion (page 639) says:

> "Counsel for appellee insists that the Georgia act of limitation, above quoted, does not apply, and should not control, in this case, because it is not a part of the act of incorporation of the Brunswick Bank of Georgia, under

which the liability sought to be enforced arises, and that, inasmuch as this act contains no specific clause of limitation, the general acts of limitation of the state of Maryland, and not those of Georgia, apply. We cannot accede to this proposition in this case. While there is force in the contention, and in some cases it would be doubtless correct, it is not, in our opinion, true here. The statute of limitations of the state of Georgia sought to be applied was not, in its broader sense, the general statute of limitation of the state, as distinguished from a statute contained in the particular enactment; but it was the special statute of limitations of that state, applicable to statutory liabilities, or liabilities arising under acts of incorporation, or by operation of law, in existence at the time and for years previous to the passage of the act of incorporation of the Brunswick Bank, and, therefore, must be considered as forming a part of, as read into, the act incorporating the bank, as much so as if it had been formally incorporated therein, and the stockholders and all persons dealing with this bank are presumed to know of its existence and are bound by its terms."

In that case, as in the case at bar, the limitation was contained in a separate section of the statutes, but, as maintained by us in this case, was the special statute of limitations of the state applicable to liabilities of the character sued upon, and was held to be read into and made a part of the act imposing the liability.

So also in the case of Hobbs vs. National Bank of Commerce of Kansas City, 96 Fed. Rep., 396, and, on rehearing, 101 Fed. Rep., 75. In that case the question before the Circuit Court of Appeals for the Second Circuit was whether the action brought in another state to enforce the statutory liability of a stockholder of a Kansas corporation is governed as to limitation by the statute of Kansas, or of the *lex fori.*

In the Kansas statutes which created the liability of the stockholders no time limit was established within which an action must be brought to enforce it. By the general statute of limitations of Kansas an action upon a liability created by statute for forfeiture or penalty must be brought within three years after the causes of action accrued. This is the Kansas limitation upon a stockholder's liability under Section 32. (See opinion of the court in 96 Fed. Rep., page 397.)

Upon the first hearing of this case the Circuit Court of Appeals simply decided that, *if* the *lex fori* was to control, the three years statute of New York was applicable. Upon the petition for rehearing, 101 Fed. Rep., the court, on page 77, says:

> "It will be recollected that the opinion (referring to the opinion of the court in the same case in 99th Fed. Rep., supra) did not decide that the statute of limitations of Kansas, which was for three years, was not controlling, but, that, if the *lex fori* was to control, the three years statute of New York was applicable."

And his Honor Judge Lacombe then expressed himself most squarely to the effect that the statute of limitations of the state creating the liability is applicable. We quote (page 77):

> "I concur fully in the memorandum filed on denying petition for rehearing. Nevertheless, I am individually of opinion that the statute of limitations applicable to cases of this sort is the statute of limitations of the state whose law-making power has created the liability; or, rather, that the action cannot be maintained in another state when a period of time has elapsed which would defeat the action in the home state, although, possibly, that period may be still further curtailed by the statute of limitations of the state in which the action is brought."

It is to be observed that in that case the statute was much less clearly made a part of the statute creating the liability than was the case in Brunswick Terminal Co. vs. Bank, supra, or in the case at bar.

In Eastwood vs. Kennedy, 44 Md., 563 (see 8 Fed. Rep., 851), it was held that where a statute of the United States for the District of Columbia gave a claim for the recovery of usurious interest, provided suit to recover the same be brought within one year after the payment of such interest, that it would not be competent for a party to recover in Maryland after the lapse of a year, and that the courts of that state were bound to respect and apply the limitations contained in the act. The court says:

> "It would not be competent, for a party to recover here for a claim where none existed under the law of the place where the contract was made; or if it had existed, to resuscitate it, where under the local law, it had ceased to be of any effect."

So in Stern vs. La Compagnie Generale Transatlantique, 110 Fed. Rep., 996, which was an action brought in the District Court for the Southern District of New York to recover for a wrongful death within the waters of New Jersey. The New Jersey statute of 1848 (1 Gen. St., page 1188) gives a right of action for wrongful death, "provided that every such action shall be commenced within 12 calendar months after the death of such deceased person."

The court, Brown district judge, held that such proviso

> "was an express condition of the right of action itself which must be given effect in every forum wherein an action based upon the statute is instituted."

But the court further held that

> "Even if such proviso be held subject to the provision of the general statute of the state that limitation should not run during the time a defendant was not a resident of the state, a plaintiff bringing an admiralty action to enforce the statutory liability in another jurisdiction more than a year after the death sued for cannot invoke such extension, where the action might have been brought in the same court at any time previously, and service on the defendant obtained, and no excuse for the delay is shown."

The court, on page 999, after stating that if the contention of the libellants were sustained the period of limitation would be according to the law of the forum where the suit is brought, says:

> "Hence, there would be no limit at all to the time within which such an action could be brought under the New Jersey statute in any other state except such limitation as the law of the latter state supplied, whether the defendant were a resident of New Jersey or not. Even a citizen or corporation resident in New Jersey, against whom the statutory law had expired in that state, might still be sued in any other state where he or his property might be found, unless the statute of limitations in the latter state prevented; and as to foreign corporations, the limitation of the statute would never attach at all, either in New Jersey or elsewhere. Kirby v. Railroad Co., 14 Fed. Rep., 261; Boardman v. Railway Co., 84 N. Y., 157; Olcott v. Railroad Co., 20 N. Y., 210; 75 Am. Dec., 393; Rathbun v. Railway Co., 50 N. Y., 656."

And on page 1000 the court says further:

> "This construction of the statutory proviso was laid down in Boyd v. Clark (C. C.), 8 Fed., 849, and it was established by the decision of the Supreme Court in The Harrisburg, 119 U. S., 199; 7 Sup. Ct., 140; 30 L. Ed., 358, where the statute under consideration was in substantially the same language as the New Jersey statute, and the court there says:

> "'The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition of the right to sue at all. . . . Time has been made the essence of the right. . . . No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown.'"

And again the court says (page 1000):

> "Nor has any sufficient excuse for the delay been shown in this case more than in The Harrisburg, even if the time-limit condition of the right of action itself could in any case be enlarged. The evidence shows no such excuse; and the fact that this libel was not filed until nearly eight months after the decision in the Middleton case on July 28, 1899, very strongly suggests that there was no intent to sue on this claim until after that decision was rendered."

But the plaintiff claims that he had a vested right to a year in which to sue, and that the provision that if when a cause of action shall accrue against a person he is out of the territory the time of his absence shall not be a part of the time limited for the commencement of the action, gave him a vested right to have his claim exist until the defendant came into the state and stayed there a year.

No case has ever held such a doctrine.

The case of Union Iron Co. vs. Pierce, 4 Biss., 327, in the Circuit Court of the United States for the Seventh Circuit was an action of debt brought by a judgment creditor upon a section of the statute of Indiana providing that upon failure of the corporation to make a report all the officers of the company

" shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof."

Demurrer to the declaration was sustained because the section was repealed after the suit was brought by the passing of an inconsistent amendment thereof without any saving clause.

The court says:

> " It is well settled that the repeal of a penal statute defeats all actions for penalties under such statute pending at the time of the repeal, unless the repealing act, in terms, saves the right to prosecute pending suits."
>
> " In view of these authorities, I think the question resolves itself into this: At the time of the commencement of this action, had the plaintiff such a vested right of recovery upon the facts stated in the declaration, as the legislature has no power to destroy? What, in the legal sense, is a vested right, it is not easy to define. Perhaps as good a definition as can be given is, that it is a fixed, established right not liable to be defeated by any contingency." . . . " If the defendant's liability arose out of a contract, the Constitution would protect the plaintiff's right against all legislation; and so the right would be a vested right. But the act on which the plaintiff's claim is founded is not in the nature of a contract; it is a statute highly penal. A New York statute contained a provision in the very words of the 15th section of the Indiana act for the incorporation of manufacturing and mining companies; and the Court of Appeals of that state held that statute not ' simply a remedial one,' but that the provision was ' highly penal.' "

The court also quotes an Indiana case against a sheriff, saying:

> " In a penalty there can be no vested right until it has been reduced to a judgment. A mere penalty never vests, but remains executory."

The case of Gregory vs. German Bank of Denver, 3 Colo., 332, was an action in assumpsit against a director upon statute making directors, on a failure to make report, " jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

The court says:

> " The right of the creditor to proceed against the trustee depended exclusively upon the statute, and when it ceased to exist, all proceedings commenced under it, in the absence of a saving clause in the repealing statute, fell with it. Inchoate rights arising under the statute were swept away. No right can be said to have accrued to creditors under the statute, unless before its repeal such right was carried into judgment. *There is no such thing as a vested interest in an unenforced penalty.*"

In the case of Sea Grove, etc., Association vs. Stockton, 148 Penn. St., 146, it was held that

> " Statutes of limitation form no part of the contract itself; they are simply declarations that if process is used, it must be used within a definite period. They do not affect the obligations of the contract, but merely the remedy, by providing that action shall not be brought after the defined period. Statutes prescribing a particular mode of procedure, on the other hand, so far as applicable, form a part of the contract itself." . . . " It is well settled that when a particular mode of procedure is prescribed, all others are denied or excluded."

It is clear that the plaintiff can claim no vested interest by reason of the provisions of the statute with reference to the absence of the defendant from the state. In fact, the act of 1895 gave him more time by increasing the limitation from one to two years. By the Section 554, to which the question

submitted by the Court of Appeals applies, he was given three years from the time of his discovery of the facts upon which the penalty or forfeiture attached.

But a right of this sort is not a contract. It is solely given by a statute as a punishment of trustees for not performing the duty imposed upon them by statute, and when the statute is repealed the whole liability goes. If the right itself is not a contract, a statute fixing the time within which suit must be brought cannot be an impairment of a contract which does not exist.

In conclusion, we maintain —

1. That under the authorities cited, and by the language of the section itself, the defendant in an action under Section 451 of the Civil Code may avail himself of the limitation contained in Section 554 of the Code of Civil Procedure wherever the suit is brought.

The Purpose and Effect of the Statute, Section 554 of Montana.

This statute (quoted ante, page 7) stands at the end of the *title* which establishes the *general* limitation law for causes of action in Montana.

Among the limitations found in the earlier sections of this title is the general statute of limitations as to " actions upon a statute for a penalty or forfeiture, when the action is given to an individual,"

etc., etc. This is the general statute of Montana, which, but for Section 554, would be the statute applicable to this cause of action. The highest court of Montana has so decided (Bank vs. Remsen, supra, and cases there cited).

But Section 554 is, in terms, made specially applicable to actions " against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law," and it prescribes the time within which action to enforce this special statutory right must be brought.

Section 554 is, therefore, first a statutory statement that the *general statute of limitations* of Montana — the TITLE — does not affect actions against directors and stockholders to recover a penalty or forfeiture imposed, or to enforce a liability created by law; and, second, it is a special limitation of the time within which action to enforce such right created by law (statute) must be brought.

The relation of this Section 554 to the statute creating the right here sought to be enforced is certain and specific — as much so as if both were printed upon the same page of the statute book, or in the same section of statute. Section 554 is, in terms, made specifically to apply to the liability of directors created by law; and as plainly it provides that the general statute of limitations shall not affect actions to enforce such right.

The plaintiff admits that if the limitation was found as a part of the same statute which creates the liability the defense would follow the right to Con-

necticut and defeat it. The distinction, however, which requires the limitation to be found in the same clause or section as the right is without reason or authority. Section 554 was effectually wedded to the statute creating the liability by the legislature of Montana, which created them both, and they cannot be divorced.

Furthermore, the earlier part of Title II contains the statute Section 541, providing that in case of absence from the state the running of the time limited by the general statute of limitations contained in that title should be suspended until the party seeking its protection returned to the state — that is to say, residence in the State of Montana was, by the earlier part of this Title II, made essential to the enjoyment of the protection of the general statute of limitations therein contained.

Not so, however, in case the action is against a director of a corporation to recover a penalty or enforce a liability created by the Montana statute. Section 554 distinctly says " this title does not affect " such actions. In such actions, therefore, it matters not where the residence of the person charged may be, or may have been. Such actions " must be brought within three years." There is no other provision in the Montana statute respecting nonresidence of a party affected by the statute of limitations, and there is therefore no requirement that the defendants here must have resided in Montana for the period of limitation before they could plead or enjoy the benefits of the statute.

This is just and reasonable, and was manifestly intended. It was known that the great majority of directors of Montana corporations have been and were nonresidents of that state, and were likely so to be. It was not desirable that liabilities like those here sought to be enforced should remain forever upon such directors. Such a result is contrary to the policy of the law, which seeks to relieve parties from overhanging and unenforced obligations by limitation, bankruptcy, and otherwise. The defendants here have lived much more than the full limitation time openly exposed to the same action which is now pending. No reason appears, and there is no reason, why the plaintiff could not have commenced his action within the limitation period, unless, perhaps, it had not then occurred to him to speculate upon the enforcement of such a liability.

But even if the statute of Montana, which makes absence from the state an interruption of the running of the limitation period, is found applicable to this action we submit that the absence in such case contemplated is absence from the state of the forum, where the right is sought to be enforced. When the statute creating the plaintiff's right and the defendants' liability is brought to Connecticut, to be there enforced in the courts of that jurisdiction, the statute, in effect, becomes the statute of Connecticut. And not only so, but the other statute, containing the limitation which has been wedded to it, is also brought to Connecticut, and both become in effect and for the purposes of the action Connecticut statutes. And, if so, the absence referred to as inter-

rupting the running of the limitation period is absence from Connecticut.

The only extension of the time for bringing such action, whether in Montana or elsewhere, which is open to be claimed, is suggested by that part of the statute itself which fixes the time when the statutory period begins to run, viz, " within three years *after the discovery* by the aggrieved party *of the facts* upon which the penalty or forfeiture attached, or the liability was created."

But this clause of the statute is not effectual or applicable here. If the defendants were charged with the payment of dividends which rendered the corporation insolvent (as in Bank vs. Remsen), or with some other offense which was not public, which was known only inside of the corporate family or the official board, then these words would possibly operate to defeat the creditor's right by the expiration of the limitation time before the creditor had knowledge of the facts which created the right. Justice and fairness to all parties prompted this provision to meet such cases. But in this case defendants are charged with failure to file a report in a public record office, pursuant to a public statute requiring that such reports be made, in a specified place, at a specified time. It has been repeatedly held that record in the proper record office of an instrument required by law to be recorded is notice to all the world, not only of the instrument itself, but of its record and of its contents. For the same reason and upon the same theory, upon the failure to file a required instrument in the proper

public record office, where it is by law required to be recorded upon a specified day, with penalty for failure so to do, the condition of the record is public notice to the world that the document has not been filed, and no one will be heard to say he did not know of such failure.

Furthermore, upon another principle the same result is reached. On the morning of the 21st day of September the plaintiff, or his assignor, knew that such a report was overdue; that his rights were affected by the presence or absence of such a report. He cannot now be heard to say that he had no knowledge of the failure, that he was not ready to inquire or to be told, or to know whether the required act had been done; he could not extend his right of action by avoiding the means of knowledge which he knew the law had made conveniently accessible expressly that he might have that very knowledge.

2. That under the law and authorities it is clear that Section 554 has the same effect as if it had been written into and made a part of Section 451, and that when suit to enforce a liability under Section 451 is brought in any jurisdiction the limitations of Section 554 go with it.

3. That this court will recognize upon mere suggestion that the questions here involved operate upon the vast and rapidly increasing interstate corporation business of this entire country, and that it is of very great interest and importance that these matters be set at rest by final and authoritative construction.

It would be wrong and unjust that the burden of the penalty or liability imposed by such statutes as are here involved upon the different members of the same board of trustees, because of the same neglect of their corporation to file required reports, should be rendered unequal by the judicial construction placed upon such statutes and their correlated limitation. That one trustee, because he happens to live in a state which has enacted no appropriate statute of limitations, should never be relieved from the burden of the penalty, while another trustee of the same corporation, by reason of a more favorable statute of another state in which he happens to reside, should be compelled to bear the burden of the same liability for only a single year, is a result which offends both justice and reason.

Such a result is wholly unnecessary. The construction claimed by the defendants to be applicable here and to be authorized both by reason and authority wholly avoids the injustice alluded to by bringing to the forum, wherever it may chance to be, together with the statute creating the liability, the statute which, by the sovereignty creating it, was intended as the limit of the right given to the creditor, wherever his domicile might be, and the limitation of the penalty or burden upon all of the trustees in whatever jurisdiction they might be found. Whatever may have been the reason which, in former years, before distances were annihilated and the theory of comity had been developed, suggested as then proper the application of the general statute of the forum as the proper several limitation of action, the marvelous increase and development of interstate

commerce in recent times has now substantially annihilated both distances and the boundaries of state sovereignty, and at the same time has destroyed the reasons upon which the rules as to this subject-matter originated and came into the common law; and it has become necessary for the highest courts of civilized countries, as to this as to other parts of common law, to modify the older existing theories and constructions where the reasons of their existence have ceased, so that the law should keep pace with the conditions which it is its function to regulate.

And particularly, when new constructions have recently enlarged the theory of comity to such an extent that actions upon the statutes creating new rights of action unknown to the common law, including such as are of penal nature and like that here involved, have become enforcible in foreign jurisdictions, both reason and authority direct the application everywhere and in all jurisdictions of that uniform limitation which is specifically provided therefor by the state of origin, and neither reason nor authority suggest the propriety of any other.

Respectfully submitted,

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